UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

TONAWANDA COKE CORPORATION and MARK L. KAMHOLZ,

Defendants.

DEFENDANT KAMHOLZ'S RESPONSE TO GOVERNMENT'S SENTENCING MEMORANDUM

Cri. No. 10-CR-219

INTRODUCTION

In many respects, this case has the trappings of a movie script. A major corporation, following a lengthy, hard fought trial, has been found guilty of a number of different environmental crimes. The owner of the company is a very successful business man known to most by name only. A segment of the surrounding community is organized to the point of having its own name, and in the media is given credit for the initiation of the prosecution in the first instance. Sentencing looms on the horizon, with many of the neighboring residents standing ready to blame the company for every ill of the past several decades.

Caught in the middle of this fervor is the second defendant charged in the case, and also convicted, the company's Environmental Control Manager, Mark Kamholz. Given that his liberty is at stake, the outcome of this matter is of vital importance to him.

Against this backdrop, there is a need to be ever vigilant that each piece of evidence weighed at the time of sentencing bears an indicia of trustworthiness. The approach taken in the Government's Sentencing Memorandum, filed September 16, 2013 [Doc. No. 216], highlights this concern. The submission is characterized more by hyperbole than an accurate identification of

appropriate sentencing factors under 18 U.S.C. §3553(a). The instances of exaggeration and overly ardent advocacy give reason to pause. The purpose of this Response will principally be to identify the many incorrect statements in the Government's Memorandum serving to render this submission, as a whole, an unreliable resource for decisionmaking at the time of sentencing.

I. A REASONABLE SENTENCE MUST BE PREMISED UPON TRUSTWORTHY EVIDENCE

A. DUE PROCESS MANDATES THAT EVERY SENTENCE BE RENDERED UPON THE BASIS OF WHOLLY ACCURATE INFORMATION

It is long been the law that there are no limitations upon the types of information that may be taken into consideration by a Court in the context of identifying an appropriate sentence in a particular case:

> In *Williams v. New York*, 337 U.S. at 247, the Supreme Court expressly recognized that because a sentencing judge's task "within fixed statutory or constitutional limits[,] is to determine the type and extent of punishment after the issue of guilt has been determined," it is "[h]ighly relevant – if not essential – to his selection of an appropriate sentence" that he possess "the fullest information possible concerning the defendant's life and characteristics." *Id.* This is no new principle. "[B]oth before and since the American colonies became a nation," sentencing judges "in this country and in England . . . exercise[d] a wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* at 246.

United States v. Broxmeyer, 699 F.3d 265, 293 (2d Cir. 2012), cert. denied, *Broxmeyer v. United States*, ____ U.S. ____, 2013 U.S. LEXIS 4326 (June 3, 2013), citing from *Williams v. New York*, 337 U.S. 241 (1949). While the types of information a Court may weigh are boundless, the quality of that information must be carefully examined in every instance.

A year before its decision in *Williams*, the United States Supreme Court cautioned that the due process safeguard requires that, without regard to severity, the process of determining an appropriate sentence must be based upon materially accurate information:

> It is not the duration or severity of the sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of a sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Townsend v. Burke, 234 U.S. 736, 741 (1948). In the *Townsend* case, a defendant, without the benefit of counsel, was sentenced upon the basis of materially false assumptions by the presiding Judge with respect to the defendant's criminal history. Over the years since the *Townsend* case was decided, sentencing jurisprudence has evolved to require that all factual findings entering into the sentencing calculus be accurate.

In *United States v. Malcolm*, the Second Circuit remarked that "[m]isinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." 432 F.2d 809, 816 (2d Cir. 1970), citing *Townsend v. Burke*, *supra*. Six years later, after first observing that, "[w]here there is a possibility that sentence was imposed on the basis of false information or false assumptions concerning the defendant, an appeal will lie to this Court and the sentence will be vacated[,]" the Circuit reiterated the critical need to ensure the factual correctness of information presented in a sentencing context:

> In appropriate circumstances, this may mean that a defendant will be permitted to submit affidavits or documents, supply oral statements, or even participate in an evidentiary hearing; alternatively, further corroboration of sentencing data may be required. And while in such

> cases the procedure to be followed lies within the sound discretion of the sentencing judge, a court's failure to take appropriate steps to ensure the fairness and accuracy of the sentencing process must be held to be plain error and an abuse of that discretion.

United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976) [footnotes omitted].

The interplay of the *Williams* and *Tucker* holdings was explained by the Court in *United States v. Fatico*, as follows:

> Williams does not hold that all hearsay information must be considered. Indeed, it is well recognized that materially false information used in sentencing may invalidate the sentence imposed. Additionally, a significant possibility of misinformation justifies the sentencing court in requiring the Government to verify the information.

579 F.2d 707, 712-713 (2d Cir. 1978) [citations omitted].

That these concepts continue to hold true is exemplified in the decision of Senior District Judge Wood in *Gordon v. United States*, 2011 WL 2638133 (S.D.N.Y.). Judge Wood first summarized the controlling principle as follows:

> Due process requires that the defendant "not be sentenced based on materially false information. [M]aterial false assumptions as to any facts relevant to sentencing render the entire sentencing procedure invalid as a violation of due process." Although "[n]ot every defect in the sentencing process . . . is of constitutional dimension," sentences have indeed been vacated on the grounds that the defendant was sentenced upon a mistaken finding of fact.

2011 WL 2638133 *2 [citations omitted]. Judge Wood then proceeded to vacate the sentence imposed upon a defendant pursuant to the child pornography guidelines based upon the United States Sentencing Commission's later publication of a report entitled The History of the Child Pornography Guidelines, which disclosed that those guidelines were not based upon empirical study and expertise.

It is, accordingly, essential that the information taken into consideration by the Court in making a sentencing determination as to Mark Kamholz first be found to be reliable and materially accurate.

B. PROSECUTION ARGUMENTS BEREFT OF A PROPER FACTUAL FOUNDATION

1. Environmental Harm

In the first paragraph of its submission, the Government boldly asserts that "[t]his case involved, in essence, the defendants releasing known killers into the air and ground of an unsuspecting community, and doing so over and over again on a nearly daily basis for decades." Government's Sentencing Memorandum at 1. Despite later acknowledging that "the government cannot specify the exact amounts of benzene and other identified air toxics known to be present in coke oven gas," the prosecution nonetheless claims that "it is hard to fathom a more serious crime, which was essentially the indiscriminate and prolonged poisoning of an entire community." *Id.* at 12. Overlooking the fact that the trial testimony consistently disclosed that the coal tar sludge from Tonawanda Coke Company's own coking operations (identified as "KO87") had been recycled into the company's ovens, the Government nonetheless also asserts that "[t]he magnitude of the amount of hazardous waste improperly handled by the defendants is shocking." *Id.* at 16 [underlining added]. Also ignoring the trial record's consistent reflection that the company's coal tar sludge was placed on and mixed into coal piles in the coal field, the Government nonetheless estimates that "more than 300 tons of KO87 waste [was] dumped on the coal field during a given year." *Id.* at 16-17 [underlining added]. These types of hyperbolic misstatements do not meaningfully advance the sentencing process.

In its earlier sentencing submission [Doc. No. 229], co-defendant Tonawanda Coke expressly stated that it has available two experts, one regarding air matters and the other regarding hazardous substances, who are prepared to testify that the actual environmental harm caused by the offenses of conviction is *de minimus*. Aside from its emotionally charged, but unsubstantiated, contrary assertions, the Government has offered no concrete evidence that the conduct at issue caused a quantifiable environmental injury either on or off the River Road premises occupied by Tonawanda Coke.

2. **The July 2003 Hazardous Air Pollutant Emission Inventory**

At trial, the defense took the position that a hazardous air pollutant study issued in July 2003 expressly referenced the pressure relief valve ["PRV"] located in the By-products area of the plant. The Government, as was true at trial, once more endeavors to argue that the PRV referenced in this study, found at a table located on page 4-2 of the report, is not in fact the PRV located in the By-products area.

a. ***The water seal bleeder at the Boilerhouse***

The Government first argues that the PRV reference in the July 2003 study could as likely be to the water seal bleeder located near the plant's Boilerhouse rather than the PRV formerly located in the By-products area. Government's Sentencing Memorandum at 10-11. The report in question is attached to the Government's sentencing submission at Exhibit 3. It is important to bear in mind that the water seal bleeder referred to in the Government's sentencing submission is located beyond the Boilerhouse, and was by no means part of the plant's By-products operation. At trial,

government counsel, in questioning trial witness Alfred Carlacci, expressly noted that the table in the July 2003 study identifying the existence of the PRV pertained to "emissions from by-product plant equipment components[.]" *See* **Exhibit A**, excerpt of trial testimony of Alfred Calacci taken on February 28, 2013, at 227, lines 17-18. Indeed, page 4-1 of the July 2003 study is captioned "EMISSIONS FROM BY-PRODUCT PLANT EQUIPMENT COMPONENTS." Government's sentencing submission, Exhibit 3. As well, on the table which appears on the next page of the report (page 4-2), the left column describes the identified components as being located in the "Byproducts Plant Area." *Id.*

Given these circumstances, to criticize defense counsel for having ignored "a second pressure relief valve on the coke oven gas line near the boiler house, which was referred to as the water seal bleeder" is baseless. Government's Sentencing Memorandum at 10. There is no room for a well-founded belief that the reference in the table on page 4-2 of the July 2003 study to the presence of a single pressure relief valve on the coke oven gas system *in the By-products Plant Area* was intended to reference the water seal bleeder at the far side of the plant's Boilerhouse.

b. ***The light oil scrubber column valve***

In passing, the Government additionally contends that "the pressure relief valve that was found on top of the light oil scrubber column, highlight[s] the inherent unreliability of the HAP Inventory, and the defendants' failure to accept responsibility for their crimes." Government's Sentencing Memorandum at 11 [footnote omitted]. The valve located on the light oil scrubber column was addressed by the Government at trial through the testimony of Martha Hamre. Not mentioned in the Government's sentencing submission, but readily apparent on the face of the table

which appears on page 4-2 of the July 2003 study, is the fact that the presence of valves on the Light Oil System is treated separately along the left column of the table from the presence of valves on the coke oven gas system. In the case of the former, it is disclosed on page 4-2 of the report that there are 36 different valves within the Light Oil System. The weakness of the Government's argument was addressed at trial during Ms. Hamre's cross-examination.

3. Release of the PRV During the April 2009 Inspection

The Government alleges that "[d]uring the April of 2009 inspection, when Defendant Kamholz was asked about the bleeder valve, he was evasive, feigned ignorance, and refused to answer any questions." Government's Sentencing Memorandum at 11-12. The witness at trial who testified regarding this circumstance was Tonawanda Coke employee Patrick Cahill. The following is an excerpt of his testimony:

> Q. OK. Did there come a time during the course of the inspection that you had a conversation with Defendant Kamholz about the bleeder valve in the presence of the inspectors?
>
> A. Yes, we did.
>
> Q. OK. Can you tell the jury where – where were you at the time of this conversation?
>
> A. Again, we were over by the green shack that green building. And I don't know what happened, but something came out of the stack. And one of the inspectors seen it and said to Mark, "What was that? Mark said, "Steam." They said "Steam? What else is it? And he said, "Pressure relief valve." "Well, how long has that pressure relief valve been in service?" Mark said, "I don't know. Pat, how long has that pressure relief valve been in service?" I told him, "I don't know. As long as I've been in the by-products." That's it.

See annexed **Exhibit B**, excerpt of trial testimony of Patrick Cahill taken on March 5, 2013 at 65, lines 4-21 [underlining added].

As the testimony of Mr. Cahill continued on cross-examination, it became evident that these responses by the defendant were completely true, and in no sense constituted a lack of cooperation on the part of Mr. Kamholz. For example, Mr. Cahill agreed that the defendant's response that the release from the valve was "only steam" was accurate. *See* annexed **Exhibit C**, excerpt of trial testimony of Patrick Cahill taken on March 6, 2013, at 61. Mr. Cahill acknowledged that, during his grand jury testimony, he had stated that he did not know whether the substance released from the valve during the inspection was coke oven gas or steam. *Id.* at 64. The witness also conceded that, despite his long tenured employment with the company, he did not know when this valve had been installed. *Id.* at 66. Mr. Cahill additionally confirmed that all questions thereafter posed to him by the inspectors regarding the PRV were answered by him truthfully, without being influenced by any other party. *Id.* at 72-73.

The defense continues to agree that how Mr. Kamholz handled the walkthrough in the By-products area prior to the April 2009 inspection is problematic; however, his reaction when the PRV released in the presence of the inspectors the following week was completely genuine. His initial response that he thought the release constituted steam and his identification of the component as a pressure relief valve was completely truthful. He did not feign ignorance nor refuse to answer questions; rather, he truthfully indicated he did not know when this valve had been installed and referred all questions regarding its operation to the head of that department. Thereafter, Mr. Cahill accurately responded to questions of the inspectors regarding the PRV without being influenced in those responses by anyone, including Mr. Kamholz. The assertion in the Government's sentencing

submission, at 12, that Mr. Kamholz was "evasive, feigned ignorance, and refused to answer any questions[ ]" is not accurate.

4. Annual Release of Coke Oven Gas from the PRV

The Government correctly states that, during his trial testimony, Harish Patel, testified that, in his view, the PRV would have omitted approximately 170 tons of coke oven gas into the atmosphere annually. Government's Sentencing Memorandum at 12. What the Government fails to acknowledge is that this estimate represents a vast overstatement of the actual facts. This issue is addressed in Defendant Tonawanda Coke Corporation's Response to the Government's Sentencing Memorandum, dated September 30, 2013 [Doc. No. 241], at 6-7. As noted by co-counsel, the estimate is based upon the highest time range, despite the fact the information relied upon by Mr. Patel provided a range of 5 to 10 seconds for each release. The estimate also did not take into account external factors that would affect the flow rate to the valve, including whether the valve had opened fully and the portion of each release when the valve would be opening and closing. The estimate ignores information provided by the company regarding a 1999 analysis of the coke oven gas, which reflected that, after passing through the different phases of the By-products department, the coke oven gas released through the PRV was devoid of most, if not all, hazardous constituents.

Instead of taking a balanced approach to this issue, the Government relies upon the exaggerated estimate embodied in Mr. Patel's prior testimony to assert that the releases by the PRV constituted "the indiscriminate and prolonged poisoning of an entire community." Government's Sentencing Memorandum at 12.

5. NEIC Report of April 2009 Inspection

The Government contends that the April 2009 inspection of the By-products area at Tonawanda Coke "revealed enormous quantities of benzene being released into the air[.]" *Id.* As support for this assertion, citation is made to air samples taken from three tar intercepting pumps which, according to the Government, "indicated significantly elevated levels of benzene (1,240 and 3,670 parts per billion by volume)." *Id.* at 13. These results are reflected in Exhibit 8, page 13 of 14, of the Government's submission. Restated in terms of parts per million, these samples reflected benzene levels of 1.2 to 3.7 ppm.

The NEIC Laboratory Report is dated June 2009. In October 2009, the Project Manager for this inspection, Martha Hamre, issued a report of her findings, which was marked Government Exhibit 15 at trial. A copy of this report is annexed as **Exhibit D**. In her report, at page 6 of 14, Ms. Hamre identified her findings and observations. The first listed area of noncompliance concerned three non-sealed tar-intercepting pumps. Despite having the benefit of the NEIC Laboratory Report (identified in her own report at page 2 of 14 as Appendix O), Ms. Hamre made no mention of these analytical results, including what the Government now characterizes as "significantly elevated levels of benzene" [Government Sentencing Memorandum at 13] as Supporting Information for her Observation/Finding regarding the three tar-intercepting pumps. She simply noted that they needed to be enclosed and sealed.

It would seem that, once again, the Government has overstated the environmental significance of this finding.

6. NYS-DEC Letter, Dated January 6, 1997, Addressing Baffles Requirement

As support for its contention that Tonawanda Coke and Mr. Kamholz both repeatedly disregarded and ignored clear directives by regulators" [*Id.* at 14], reference is first made to a letter forwarded to Mr. Kamholz by New York State Department of Environmental Conservation ["NYS DEC"] Inspector Gary Foersch on January 6, 1997. Government's Sentencing Memorandum at 14. The letter is annexed to the Government's submission as Exhibit 15. This letter from Mr. Foersch responded to correspondence approximately one week earlier from Mr. Kamholz, requesting permission to reduce the height of quench tower #2. The Government argues that the statement in the Foersch letter that all quench towers require baffles was ignored by the defendants who "then operated the quench tower, in direct violation of their permit and in disregard of the NYS-DEC directive for the next 12 years." *Id.*

Inspector Foersch was one of a handful of witnesses called by the defense at trial. His testimony demonstrated that, despite the express reference to the baffles requirement in this January 6, 1997 correspondence, his repeated conversations with Mr. Kamholz on the subject of baffles and quench towers hardly provided a "clear" directive to the defendant on this topic. A copy of excerpts from Mr. Foersch's trial testimony taken on March 20, 2013 is annexed as **Exhibit E**. During his direct examination at trial, Mr. Foersch was referred to Mr. Kamholz's December 29, 1996 letter. **Exhibit E** at 59. He acknowledged that, in this letter, Mr. Kamholz was repeating an argument he had made in correspondence years earlier regarding the plant's other quench tower "as far as being low to the ground and wide that there would be less entrainment and carry-out of any particulate into the air." *Id.* at 61. Continuing, Mr. Foersch stated that he had reviewed this argument with his supervisor, Henry Sandonato, who agreed with the point being made by

Mr. Kamholz. *Id.* at 62-63. The witness confirmed, as his testimony continued, that he had discussed this argument with the defendant. "I basically agreed in principle with his arguments[,]" and communicated that agreement to the defendant. *Id.* at 64. These discussions, including Mr. Foersch's agreement with Mr. Kamholz's point regarding the need for baffles in a shortened quench tower, took place "throughout the time that I did inspections there." *Id.* at 65. To be clear, these discussions continued even after the January 6, 1997 letter regarding the supposed need for baffles and quench towers had been sent by Mr. Foersch to Mr. Kamholz. *Id.* at 69.

Simply, with respect to the requirement of baffles in the company's quench towers, it is not correct to assert that Tonawanda Coke and Mr. Kamholz "repeatedly disregarded and ignored clear directives by regulators[.]" Without question, the directives on this issue were clouded in ambiguity; the directive in the correspondence relied upon by the Government in its sentencing submission was directly contradicted by Mr. Foersch's ongoing conversations on the same subject matter with Mr. Kamholz.

7. <u>Shutoff of the Battery Flare's Pilot Light</u>

The Government, on the issue of failing to follow regulatory directives, next refers to the period of time when the pilot light for the flare located on the battery was turned off. Government's Sentencing Memorandum at 14-15. The defense acknowledged in closing arguments at trial that Mr. Kamholz's knowledge that this pilot had been shut down represents a proper source of criticism; as the environmental manger at the plant, he should not have allowed this condition to exist.

The Government, however, inaccurately contends that this decision rested on the shoulders of Mr. Kamholz. In particular, it is claimed that "Defendant Kamholz implemented a manual

lighting system for the battery flare stack, exactly what the EPA told him not to do[.]" *Id*. at 14. Continuing, it is also incorrectly claimed by the prosecution that the pilot light was "removed" from the battery flare stack. *Id.*

This subject was explored at trial through the testimony of Anthony Brossack. An excerpt from the transcript of testimony taken from Mr. Brossack on March 4, 2013 is annexed at **Exhibit F**. The following represents Mr. Brossack's recollection of this event during cross-examination:

> Q. You had mentioned about the conversation that you had with Mr. Kamholz regarding a flare that's on top of the battery.
>
> A. Yes, sir.
>
> Q. And when did you say that happened?
>
> A. I believe it was 94, 95. Someplace up around there.
>
> Q. All right. And Mr. Kamholz was asked a question about the – the fact that the – the pilot light was not on –
>
> A. Yes.
>
> Q. – for the flare. And you testified that his response was that natural gas was expensive?
>
> A. Yes.
>
> Q. And is that all he said?
>
> A. That's all he said to me at that time, yes.
>
> Q. And in terms of who made that decision to not have that natural gas run to the pilot, you don't know who made that decision, do you?
>
> A. No, I don't.

* * *

Q. You don't mean to suggest by your testimony that it was Mr. Kamholz who decided that natural gas would not be run to that pilot?

A. No.

Exhibit F, at 115, line 13 – p.116, line 7, and at 116, line 23 – p. 117, line 1[underlining added]. In fact, there is no evidence that, with respect to this circumstance, Mr. Kamholz was anything other than a messenger, communicating a decision made by upper level management at the company. As well, the pilot light was never removed, as the Government incorrectly suggests, the supply of natural gas to this device was turned off.

8. Alleged Contamination of the Coal Field

The Government, while acknowledging that any contamination of the coal field has yet to be investigated, nonetheless states in its submission that it "believes that widespread contamination of the soil and ground water in the coal field will be found." Government's Sentencing Memorandum at 17. This topic is addressed in the response of co-defendant Tonawanda Coke to the Government's Sentencing Memorandum. In particular, the Tonawanda Coke response pleading, referring to its original Sentencing Memorandum [Doc. No. 229], at 24-27, recites that these observations of the Government wholly ignore "the extensive parallel administrative and civil compliance orders that have addressed this precise issue over the past four years and the historic actions taken by the company in concert with NYS DEC at the plant dating back to the early 1980's." Defendant Tonawanda Coke Corporation's Response to the Government's Sentencing Memorandum, at 9-10. Under regulatory oversight of both the NYS DEC and the Environmental Protection Agency, it has been found that the impact from any potential contamination in the coal

storage area is *de minimus*. *Id.* Any unsubstantiated belief on the part of the Government to the contrary should be given no weight by the Court in its consideration of §3553(a) factors.

9. Purpose for Constructing Concrete Pad

The Government incorrectly contends that the "witness testimony at trial . . . established that when the concrete pad was first installed, it was used for the mixing of K-087 and thus the material did not touch the ground." Government's Sentencing Memorandum at 18-19. The principal witness who testified on this subject was John Ohar. A transcript of his trial testimony is not available; however, during cross-examination Mr. Ohar did recollect that, once the concrete pad was installed at Tonawanda Coke in the vicinity of the coal field, it was used as a storage and staging area for coal tar sludge generated at other facilities that was trucked into the plant for the purpose of being recycled. This same subject was covered during the examination of another trial witness, Jon Rogers. Mr. Rogers testified on direct examination that, after construction of the concrete pad, the coal tar sludge generated by Tonawanda Coke continued to be placed on the coal piles, and this practice did not stop until after the execution of a search warrant by federal authorities (in December 2009). *See* annexed **Exhibit G**, trial testimony of Jon Rogers taken on March 12, 2013, at 20, lines 10-23. During cross-examination, Mr. Rogers confirmed that, after the concrete pad was constructed, it "then served as a staging area or a storage area for this off-site coal tar sludge when it was brought in it [*sic*] by truck[.]" *Id.* at 40, lines 8-17.

The Government additionally makes reference to a defense exhibit (BBB) which was not used at trial. Government's Sentencing Memorandum at 19. A copy of this exhibit is annexed to the Government's sentencing submission at Exhibit 31. Referring to this exhibit, the Government

alleges that "[c]onveniently at trial, the defendants elected not to introduce this exhibit, and rather, claimed that they believed that KO87 waste could be mixed on the coal." *Id*. at 19. The page the Government relies upon from this exhibit is page 11, which is captioned "K-Listed Recycling at Tonawanda Coke Corporation." *Id.* Exhibit 31 at 11. Contrary to the claim of the Government, this description of the recycling process using the concrete pad does not refer solely to "KO87." It refers generally to "listed K material." The summary of recycling specifically refers to 40 CFR 261.4. The exclusions provided for in 40 CFR 261.4 are recited, verbatim, at pages 12-14 of Exhibit 31, attached to the Government's sentencing submission. Subsection (a)(10) of 40 CFR 261.4 (*Id.* at 14) specifically identifies the various K wastes subject to this exclusion (without limitation to KO87). More to the point, the purpose for constructing the concrete pad is confirmed at page 15 of Exhibit 31 to the Government's sentencing submission. This document is captioned "Operating Procedure For Recycling Center." The description which follows makes clear beyond doubt that the entire discussion in this exhibit relates to trucking in off site coal tar sludge being brought to Tonawanda Coke for recycling.[1]

Once more, the Government's version of the facts, as set forth in its sentencing submission, is wrong, and its insinuation regarding the motives of defense counsel is, at minimum, unfortunate.

[1]Contrary to the Government's accusation, the reason Defense Exhibit HHH was not offered at trial was because its purpose, to demonstrate the rationale for constructing the concrete pad as a storage and staging area for off site coal tar sludge brought to the plant for recycling, was easily demonstrated through the examination of government witnesses Ohar and Rogers. There was then no need to use the exhibit.

10. August 2007 Investigation of Transformers at Tonawanda Coke

As part of its discussion of prior environmental violations at Tonawanda Coke, the Government makes reference to an investigation by the NYS DEC of transformers being stored at Tonawanda Coke. While correctly noting that an anonymous complaint had been received which alleged that "oil from eight large electrical transformers was emptied onto the coal field[,]" [Government's Sentencing Memorandum at 21], no mention is made that what was actually discovered was "8 or 9 transformers on site with some leaking," nor that "transformers were staged on concrete but small amount did reach a small area of grass/soil." [NYS DEC Spill Report, entry dated 8/16/07, annexed as Exhibit 32 to Government's sentencing submission (underlining added)]. What the additional entries on this Spill Report reveal is an ongoing, cooperative effort between Mr. Kamholz and representatives of the NYS DEC over the next several months to address this issue and the necessary cleanup. Throughout this contact, no action was taken by Mr. Kamholz absent guidance from the NYS DEC. By December 11, 2007, all necessary action, including cleanup of the limited level of contamination, was completed.

The matter was resolved through an Order On Consent which was finalized on July 17, 2008. A copy of the Order is annexed as **Exhibit H**. That Order reveals that the cited violations were limited to the illegal storage of a PCB laden transformer on an outdoor pad, which did not have proper labeling with respect to the accumulation date or the fact the transformer contained PCB waste. **Exhibit H**, ¶¶ 5-7. The end result was that Tonawanda Coke conducted the required remediation and agreed to pay a civil penalty of $9,000. Simply, this was not a matter of great consequence.

In its submission, the Government also chooses to make reference to an allegation made by an unidentified Tonawanda Coke employee that Mr. Kamholz had remarked that he "had to do some 'fast talking' to stay out of trouble." Government's Sentencing Memorandum at 22. The Government's purpose for including this reference in its papers is unclear; however, the surrounding paperwork belies any suggestion that this incident is a reflection of past wrongdoing on the part of Mr. Kamholz necessitating that he engage in fast talking.

11. Contents of Abandoned Railroad Tanker Car

The Government invests four pages of its submission in discussing activity which occurred between 2007 and 2008 involving the recycling of the contents of an abandoned railroad tanker car located at the Tonawanda Coke site. Government's Sentencing Memorandum at 22-25. The same activity had been the subject of what was originally Count 19 of the Indictment; however, this charge was dismissed after it was discovered by the defense that the Government's testing protocol regarding samples taken from this tanker car had been compromised. An effort by the Government to nonetheless use the underlying factual matter based upon a Federal Rule of Evidence 404(b) theory was rejected by the Court upon the basis that no reliable determination could be made regarding the true character of the substance taken from this tanker car.[2]

Despite the Court's finding, the Government's discussion of this subject matter proceeds on the unsubstantiated assumption that the product taken from the tanker car was used oil. For example, it is remarked that "[t]he material was not tested for PCBs or for total halogen content, and as such,

[2] *See* Defendant Tonawanda Coke Corporation's Response to the Government's Sentencing Memorandum, dated September 30, 2013, at 12-13.

the defendants would not have been entitled to consider this material 'used oil' under RCRA, which could then be burned in the coke ovens." *Id.* at 24.

In fact, the greater weight of the evidence supports the conclusion that this substance was not, as the Government suggests, a petroleum-based used oil. To the extent that this substance was a by-product of earlier coking activities, it could be either recycled or used as a raw material. As such, as there would then not be a disposal of this material, there would have been no requirement to perform the Toxic Characteristic Leaching Procedure test referred to by the Government in its submission. *Id.* at 24-25. The same would be true of the Beneficial Use Determination referenced by the Government. *Id.* at 25.

What the testing undertaken by Mr. Kamholz in the early Fall 2007 determined was that this substance was a coking process by-product, and not used oil. Annexed as **Exhibit I** are test results from Wastestream Technology Inc., dated September 14, 2007, and Cooper's Creek Chemical Corporation, dated October 9, 2007. The critical findings in these two reports are at pages 3 and 4 of the Wastestream Technology report (where semivolatile organic compounds are addressed) and the second page of the Cooper's Creek report (where it is found that the material contained 40 percent naphthenic oil and 20 percent aromatic oil.) These types of oils are different than the used oil referenced by the Government.

At the very least, as noted above, the Court has correctly noted that the exact character of the substance contained in this tanker car has not been reliably demonstrated by the Government, and this matter should not properly be considered as part of the sentencing equation in this case.

12. Mr. Kamholz's Interaction with Pennsylvania DEP Inspector Dunagan

Relying upon information provided by Gerald Priamo, a former Tonawanda Coke employee, the Government accuses Mr. Kamholz of "intimidation tactics" in reference to his interaction with an unidentified Commonwealth of Pennsylvania Department of Environmental Protection ["DEP"] Inspector. Government's Sentencing Memorandum at 26-27. The report of interview of Mr. Priamo relied upon by the Government is annexed to its submission as Exhibit 40. On page 7 of that report, this inspector is identified as "Bill Dunigan." It is understood that this inspector's last name is correctly spelled "Dunagan."

Two allegations, dehors any detail, are set forth in the Government's submission. First, it is claimed that Mr. Kamholz "crumpled up the violation [notice], threw it at the regulator, and stated that it was 'bullshit' and went home." Second, it is contended that, while discussing the character of a coke oven push at Erie Coke Corporation, "Defendant Kamholz shoved the regulator and the regulator fell to the ground." *Id.* at 26. Mr. Kamholz denies that either of these incidents ever occurred. Certainly, based upon the reference letters included with Mr. Kamholz's sentencing submission [Doc. No. 238], any such behavior on his part would be wholly out of character. Given that there was a lengthy trial in this matter, the Court also has the benefit of the testimony of various witnesses concerning Mr. Kamholz's demeanor, including in particular his interaction with regulators at Tonawanda Coke.

Annexed as **Exhibit J** are two affidavits which endeavor to address these allegations. The first affidavit is from Edward G. Kiter, a former employee of the Pennsylvania DEP, who retired in

2011.[3] Mr. Kiter indicates in his Affidavit that he is acquainted with Mr. Dunagan, and also with Mr. Kamholz. He was responsible for training Mr. Dunagan. **Exhibit J**, Kiter Affidavit, ¶ 2. He states that either allegation, throwing a Notice of Violation at an inspector or shoving an inspector to the ground, would constitute a reportable event under DEP rules. *Id*. ¶¶ 5, 6. He further indicates that, based on his knowledge of Mr. Dunagan, he would have most certainly caused a written report to be prepared had either of these incidents occurred. *Id.* ¶7. Mr. Kiter, while with the DEP, never heard anything about either alleged incident. *Id*. ¶ 4. Mr. Dunagan is described as being taller and having a larger build than Mr. Kamholz. *Id.* at ¶8. Mr. Kiter concludes his Affidavit by stating that, based upon his past relationship with Mr. Kamholz, the actions alleged by the Government would be completely inconsistent with the defendant's character and disposition. *Id.* ¶10.

Also annexed as part of **Exhibit J** is an Affidavit of Joseph P. O'Hara. Mr. O'Hara served as Assistant Plant Manager, and then as Plant Manager, at Erie Coke Corporation between 2005 and 2007. His duties included the receipt and review of Notices of Violation issued by the Pennsylvania DEP. **Exhibit J**, O'Hara Affidavit, ¶2. Mr. O'Hara states in his Affidavit that he neither heard anything at Erie Coke Corporation regarding, nor ever received a Pennsylvania DEP notice making reference to, the two allegations directed against Mr. Kamholz. *Id.* ¶¶ 4, 5, 6.

These two scandalous accusations, unsubstantiated as they are, do not warrant the Court's consideration in the sentencing context.

[3]Mr. Kiter now performs Method 303 inspections on a periodic basis for a private company at Erie Coke Corporation.

13. Mark Kamholz's Authority as Environmental Control Manager

Overstating the testimony extracted from witnesses called to testify at trial, the Government asserts that "defendant Kamholz had complete control over environmental matters at Tonawanda Coke and could direct any employee with regard to environmental matters." Government's Sentencing Memorandum at 27. The Government supports this assertion by referencing three different categories of information, which are discussed below.

a. ***Trial testimony of Jon Rogers***

The Government alleges that Mr. Rogers testified at trial that he was "directed by Defendant Kamholz to conduct several labor intensified projects including the mixing [*sic*] waste on the coal piles and relocating the unpermitted bleeder valve." *Id.* As noted above, Mr. Rogers's trial testimony is annexed as **Exhibit G**. At no point in his testimony did he state that Mr. Kamholz directed him with respect to mixing waste (or KO87) on the coal piles, nor did he testify that he received any direction from the defendant regarding the relocation of the PRV. Mr. Rogers was questioned on a very limited basis regarding emptying the coal tar decanter at Tonawanda Coke. On redirect examination, he was asked questions having to do with quantities of coal tar sludge removed from the Tonawanda Coke tar decanter. *See* **Exhibit G**, at 48-50. No mention was made of Mr. Kamholz in this portion of the Rogers trial testimony. Mr. Rogers was asked on two occasions about the installation of the PRV; again, no mention of Mr. Kamholz is made in either of these segments of his testimony. *Id.* at 6, 40-41. The only references in Mr. Rogers's trial testimony to his receipt of direction from Mr. Kamholz concerned digging a settling pond and addressing the condition of and around the Barrett tanks following the fire in the Summer 2008. *Id.* at 9, 26-27.

b. ***Testimony of G. Priamo, P. Cahill, and D. Heukrath regarding environmental compliance***

All that the Government indicates on this subject is that, as Plant Managers, these three individuals relied upon Mr. Kamholz with respect to environmental compliance matters. Government's Sentencing Memorandum at 27. Given his position with the company, this is not surprising.

c. ***Forgery allegation as to completion of environmental compliance documents***

The Government once again relies upon former Tonawanda Coke employee Gerald Priamo in alleging that "it appeared that Defendant Kamholz forged his name on environmental compliance documents." *Id.* at 27-28. The core of this allegation is that the Government has identified two such documents (Exhibits 42 and 43, annexed to its sentencing submission) where a signature purporting to be that of Mr. Priamo appears followed by the initials "MLK." The Government states that Mr. Priamo denies having signed either of these documents. *Id.* at 28.

Accepting Mr. Priamo at his word, this conduct would have not constituted a forgery. In *Gilbert v. United States*, 370 U.S. 650 (1962), the United States Supreme Court held that a defendant who signed the name of a designated payee on a government check followed by signing his own name, as agent, was not guilty of forgery. The Ninth Circuit has since extended this holding to a defendant who enters his initials next to an unauthorized signature on a check. *United States v. Faust*, 850 F.2d 575 (9th Cir. 1988). Beyond the fact that neither of the examples cited by the Government constituted a forgery in the technical sense, a Manager of Environmental Controls' execution of documents having to do with environmental matters, where his initials are placed after the allegedly unauthorized signature, should hardly be viewed as any type of impropriety. The

evidence at trial demonstrated in all events that Mr. Kamholz was well known to both federal and state environmental regulators as the contact person at Tonawanda Coke. Whether the documents referenced by the Government were signed by Mr. Priamo or the defendant, the person who would have been contacted in the event a question arose was Mr. Kamholz.

14. November 2012 Petroleum Spill Report

The Government references a November 14, 2012 NYS DEC Field Inspection Report having to do with observations of suspected petroleum spills at Tonawanda Coke. The Government purports to equate this inspection to what is described as the "poor housekeeping and equipment deficiencies that were noted the April of 2009 inspection." Government's Sentencing Memorandum at 28. Continuing, the submission asserts that it is "shocking" that, "only months away from trial, [the defendants] would allow such widespread petroleum contamination to occur." *Id.*

The report at issue is annexed to the Government's Sentencing Memorandum as Exhibit 44. Tonawanda Coke's response to the Government's sentencing submission, at 13, addresses this allegation noting that the company awaits agency approval of the remediation of these conditions proposed by an outside environmental consultant. Notwithstanding that the vast majority of the 15 conditions referenced in the NYS DEC report are based upon appearances of suspected petroleum contamination, the company has stepped forward and expressed an immediate willingness to address this condition in a meaningful way.

15. Tonawanda Coke's Internal Business Plan Documentation

At page 31 of its submission, the Government alleges that "[t]he defendants could have chosen to do things the right way, and they certainly have the financial wherewithal to do so. Instead, the defendants noted in their internal business plans that environmental compliance was a weakness, and that a corporate risk was the cost associated with environmental mandates." Government's Sentencing Memorandum at 31. The linking of these written materials to Mr. Kamholz is not supported by the evidence, and represents another example of the Government's carelessness in its factual presentation.

16. Community Impact Letters

The Court unquestionably has the authority to consider the 128 "impact letters" included in the Government's sentencing submission at Exhibit 47. How the Court chooses to treat these letters is understood to be a very sensitive issue. The question does not concern the sincerity of the authors of these letters, nor the genuineness of their belief that the medical conditions referenced in their letters were caused by the actions of the defendants. What is critical, however, is the weight that should be given to these letters given that the Government acknowledges in its submission that it "cannot point to any particular individual victim[.]" *Id.* at 32. The suggestion that "whether or not a causal connection may someday be established," these letters should nonetheless be considered in the sentencing context is, however, highly objectionable. *Id.*

The decision of Senior District Judge Kimba Wood in *Gordon v. United States, supra,* is discussed at the outset of this response memorandum. Even after having imposed a sentence following the defendant's conviction for the illegal receipt of child pornography, Judge Wood

elected to vacate that sentence upon discovering that the child pornography guidelines had not been the product of empirical study and expertise by the Sentencing Commission. So much more so should this Court, before imposing a sentence in this matter, hesitate to act upon letters from residents of the community surrounding the Tonawanda Coke facility and politicians serving those communities that complain of medical conditions not in any reliable sense linked to contamination or pollution caused by the offenses of conviction. The danger of doing an injustice, of relying upon misinformation, is simply too great. This risk is amplified by the absence of any evidence the activities at Tonawanda Coke have caused a quantifiable environmental harm, and the presence in the same community of so much other industry, including the Huntley Plant, DuPont Corporation, Dunlop Tire, and various other petroleum and chemical storage facilities, not to mention traffic traveling on Interstate Routes 190 and 290 that regularly is required to idle upon approaching the South Grand Island bridge.

Even the Pre-sentence Investigation Report, at ¶53, expressly finds that the offenses at issue did not involve victim injury or loss. This represents a finding which has not been objected to by the Government. In fact, the Statement of the Government with Respect to Sentencing Factors, filed September 16, 2013 [Doc. No. 236], expressly adopts all of the findings set forth in the Pre-sentence Investigation Report. Mr. Kamholz additionally joins in the arguments on this subject set forth in Defendant Tonawanda Coke's Response to the Government's Sentencing Memorandum, at 15-19.

17. NYS DEC Inspector Corbett's Knowledge of Planned Recycling of Barrett Tank Materials

The willingness of the Government to blatantly mischaracterize the trial evidence is exemplified in its disagreement with co-defendant Tonawanda Coke's recounting in its Offense Statement of the trial testimony of NYS DEC Inspector Thomas Corbett. In particular, the Government contends that, as of June 2009, Mr. Corbett had not been made aware that the company intended to recycle the material removed from the Barrett tanks, or in its coal piles as part of the coking process. Government's Sentencing Memorandum at 33 n.8. Mr. Corbett's testimony on this subject is captured in the excerpt of his trial transcript set forth in Tonawanda Coke's Response to the Government's Sentencing Memorandum at 7-8 n.2. That summary reflects that, at one point, Mr. Corbett was specifically asked "did Mr. Kamholz tell you that the recycling was occurring on the coal piles?" The witness responded "Coal pile located in the coal field." *Id.*

* * * * *

A painstaking effort has been made in this submission to identify those specific instances when the Government's sentencing submission relies upon exaggeration, carelessness, misinformation, or inaccurate factual statements as part of its argument that an unduly severe sentence should be imposed upon Mr. Kamholz for the offenses at issue. The problem with the Government's approach to this important issue is that great caution must then be exercised before acting upon any arguments it advances. Whatever the motivation for the prosecution's lack of precision in its factual representations, a determination of the sentence which will be sufficient, but not greater than necessary, to address the appropriate §3553(a) factors in this case, must scrupulously avoid reliance upon information that is lacking in trustworthiness.

II. THE GOVERNMENT'S REMAINING §3553(a) ARGUMENTS MUST BE CONSIDERED IN THE PROPER CONTEXT

A. CLEAN AIR ACT PERMIT APPLICATIONS

The Government cites to the omission of the PRV in either Tonawanda Coke's original Title V Clean Air Act permit application in 1997 or in its application to renew that permit in 2006 as an appropriate sentencing factor. Government Sentencing Memorandum at 10. Mr. Kamholz's Offense Statement, annexed to the Pre-sentence Investigation Report, explains that, since return of the jury's verdict, he by coincidence discovered correspondence exchanged with the NYS DEC in June 1977 while addressing a sewer backup issue at the plant. This now 35-year-old correspondence, which is annexed to Mr. Kamholz's Sentencing Memorandum as Exhibit D, identifies a single "Gas Bleeder Vent" as being exempt pursuant to 6 NYCRR 212.8(b). Mr. Kamholz is copied on this correspondence. A schematic accompanied this letter, and identifies this vent as being located at a point other than the By-products area of the plant. Mr. Kamholz indicates in his Offense Statement that he believes the schematic does not accurately depict the location of this particular vent.

He states that it is his belief this letter references the PRV at issue, and it is this correspondence that provided the source for his longstanding belief that the PRV was exempt from permitting requirements. As he also explains in his Offense Statement, it is his best recollection that he did not become aware of the frequency of the discharges of the PRV until 2008. In evaluating why the PRV is not mentioned in either Tonawanda Coke's original Title V permit application, or the later renewal, it is requested that the Court take these circumstances into consideration. Indeed,

had the 1977 correspondence been known to the defense at the time of trial, an effort would have been made to introduce evidence regarding the substance of that correspondence during the trial proceeding.

B. April 10, 2009 By-products Area Walkthrough with Patrick Cahill

At page 11 of its sentencing submission, the Government appropriately makes reference to the April 10, 2009 conversation between Mr. Kamholz and then By-products area foreman Patrick Cahill regarding the release of the PRV. The defense does not deny the remark made by Mr. Kamholz that the PRV should not release during the upcoming inspection of the By-products area. Indeed, it is this conduct which forms the basis for Mr. Kamholz's conviction of Obstruction of Justice, and gives rise to a two level enhancement under the *Sentencing Guidelines*.

There are, however, as developed at trial, mitigating circumstances. As noted above, excerpts of the trial transcript of Mr. Cahill, representing testimony given on March 6, 2013, are annexed as **Exhibit C**. During his cross-examination, Mr. Cahill agreed that the defendant never told him to take any action to adjust the pressure setting of the PRV. **Exhibit C** at 49, lines 3-12. Mr. Cahill, in fact, never discussed his activities regarding adjustment of the PRV pressure setting with Mr. Kamholz. *Id.* at 50, lines 4-8. Mr. Cahill testified that he did not record his activities in the By-products logbook. He agreed that Mr. Kamholz never told him to not make these entries, and that he never informed the defendant these entries had not been made by him. *Id*. at 55, lines 1-9. There was no follow-up of any kind by the defendant after he made the single remark to Mr. Cahill on April 10, 2009. He did not check with Mr. Cahill over the weekend before the inspection began on April 14, 2009 to ensure something would be done regarding the pressure setting for the PRV, nor

did Mr. Kamholz check back with Mr. Cahill during the course of the inspection, including when the PRV released, or at any time thereafter up to the time of Mr. Cahill's trial testimony. *Id.* at 58, lines 4-24.

In his Offense Statement, Mr. Kamholz has accepted responsibility for the statement made by him to Mr. Cahill during the pre-inspection walkthrough on April 10, 2009. He has acknowledged that he should have given greater thought before making this remark, and he has accepted full responsibility for the later actions taken by Mr. Cahill. The circumstances of the remark, and the later reticence of the defendant with respect to this matter, are, however, important considerations that serve to mitigate the seriousness of the offense.

C. April 14, 2009 Opening Interview with Regulators

The Government further criticizes Mr. Kamholz for having supposedly misrepresented to the regulators, during their opening conference on April 14, 2009, "that there were no pressure relief valves[.]" Government's Sentencing Memorandum at 11. This statement by the Government is understood to be derived from the handwritten log of the inspection maintained by Martha Hamre, a government trial witness. These handwritten notations were marked at trial as Government Exhibit 3527.21. A copy of this log is annexed as **Exhibit K**. The specific reference, relied upon by the Government at trial, appears on page 3527.21-004. In the middle of the page, on the right hand side, is the underlined statement "By-products plant flow diagram." Immediately above that statement is the entry "Pressure relief valves - no."

At trial, it was pointed out on cross-examination of Ms. Hamre that the notations immediately above the reference to pressure relief valves concern the flare in the coke oven battery, which is

known to not be a pressure relief valve. In fact, the statement at the top of the right hand column on page 3527.21-0004 of the Hamre log, in reference to this flare, is "No steam assist." The entry immediately below this comment again refers to the battery flare. The next entry, having to do with operating in a coke oven gas deficit, refers back to the preceding entry that "Coke oven gas would go to flare if not routed to plant[.]" It is immediately following the reference to a coke oven gas deficit that the entry "Pressure relief valves - no" appears. It is only *after* this entry that the Hamre log notes meaningfully discuss the operation of the By-products area.

Ms. Hamre does make specific reference to the PRV in the By-products area in her October 2009 report, annexed as **Exhibit D**. On the final page of that report, page 14 of 14, she lists the PRV as an Area of Concern. Throughout this discussion, no mention is made of the fact that she was ever led to believe no pressure relief valve existed in the By-products area. At the very least, the reference in the Hamre handwritten log to an absence of any pressure relief valves is ambiguous, and should not be given weight by the Court in determining an appropriate sentence to be imposed upon Mr. Kamholz.

D. Mr. Kamholz's Folder of Historical News Articles

The Government makes reference to a folder seized from Mr. Kamholz's office in December 2009 as support for the argument that he had an awareness of a benzene issue at Tonawanda Coke as early as 2005. Government's Sentencing Memorandum at 15. This folder is annexed to the Government's Sentencing Memorandum as Exhibit 19. The exhibit consists of three news articles, a fact sheet, and an invitation to a public meeting. None of the three news articles make reference to testing performed at or near Tonawanda Coke. The citizen generated test results discussed in

these news articles focused on a NOCO tank farm located on Grand Island Boulevard and the 3M-OCello plant situated on Sawyer Avenue. At best, it can be said that Tonawanda Coke is identified as a *possible* benzene source. One of the articles, which is undated but bears the designation Government Exhibit 118.03, includes the express statement: "But state officials and representatives from the businesses question the results, saying they weren't consulted and haven't received the findings." This is a reference to a citizen conducted benzene test using a primitive device known as a bucket. Neither the fact sheet nor the notice of public meeting contain pertinent information.

It requires a leap of faith to conclude from these three articles that Mr. Kamholz was put on notice as early as 2005 that a benzene issue existed at Tonawanda Coke. The content of the articles does not support that assertion.

E. Exposure of Barrett Tanks to the Environment

The Government contends that the failure to take more meaningful steps regarding the condition of the two Barrett tanks constitutes an appropriate sentencing factor. Government's Sentencing Memorandum at 17-18. It was stipulated at trial that the condition of these tanks, their contents, and the material surrounding the tanks principally represented historical conditions that were not the responsibility of Tonawanda Coke or Mr. Kamholz. Based upon a jury finding that the area surrounding these tanks had been "actively managed," both defendants then became responsible for these conditions. To suggest, however, looking back in time that dereliction can be attributed to any action not taken with respect to these conditions by either defendant would be inappropriate.

As of the Summer 2009, the trial evidence established that steps were in motion to address the contents of the Barrett tanks. The testimony of Inspector Corbett specifically confirmed that he

was informed on June 17, 2009 by Mr. Kamholz that the company intended to dispose of the contents of the tanks by mixing that material in the coal piles. No mention was made on that date by Mr. Corbett, nor by any other federal or state inspector who was present, that any immediate action should be taken regarding the condition of the Barrett tanks, their contents, or the material surrounding the tanks. Again, to attribute some level of culpable responsibility to Mr. Kamholz for inaction during this time period would be infair.

The Government makes reference to a single photograph, annexed to its sentencing submission as Exhibit 24, to argue that evidence existed of coal tar leaking out of the tanks onto the ground on June 17, 2009. The photograph is marked Government Exhibit 003.09. To the extent the photograph depicts leakage, it is of a very limited nature. Beyond that, however, regulators were present on that date and failed to recommend that any action whatsoever be taken regarding the conditions in and surrounding the Barrett tanks.

F. Environmental Training

The Government refers to trial testimony by several employees indicating they had not been provided with environmental training at Tonawanda Coke. The Government characterizes this testimony as indicating that "the defendants did not provide any type of environmental training for their employees." Government's Sentencing Memorandum at 20 [underlining added]. Later in the same paragraph, the Government criticizes the defendants for not having provided "even the most basic environmental training to its employees[.]" *Id.*

While several witnesses at trial were generally questioned about the receipt of environmental training at Tonawanda Coke, none were asked follow-up questions by the Government confirming

the position now being taken that absolutely no environmental training took place at Tonawanda Coke at any time. Annexed as **Exhibit L** are examples of training provided to Tonawanda Coke personnel that reference training related to environmental matters. Those samples may be described as follows:

1. Safety orientation checklist - This checklist is reviewed with each new employee. Under **Category E Emergency Procedures**, reference is made at item 3 to "Spill." All new employees receive training regarding spills, which would include coal tar, caustics, and weak liquor spills.

2. Job requirement checklist - This set of materials relates to training provided to personnel assigned to the battery. It is the responsibility of the battery foreman to train personnel on the topics reflected on these checklists, and to then complete the checklist. Samples of this checklist are provided for years 2005-2009, the time period covered by the Indictment. On each of these checklists, item #6 is noteworthy, as it pertains to **Environmental Issues**. All employees assigned to the battery are instructed regarding gasketing doors, keeping the top sealed, eliminating emissions, sweeping the battery top, using the jumper pipe, and ensuring that door fires are put out immediately. The purpose of this aspect of the training of battery personnel is to minimize the risk of harm to the environment.

3. Training program - This set of materials supplements the checklist referred to above, providing more detail with respect to the responsibilities associated with the different job assignments in the battery area. Many of these descriptions pertain to taking necessary steps to protect the environment.

4. Training employee sign-in - Since the return of the jury's verdict, the company has begun a required training program entitled HAZWOPER. This program specifically has to do with the handling of hazardous materials.

A general statement that the company was not fully committed to a full blown environmental training program for its employees would find support in the trial record. The attempt, however, to translate the limited testimony at trial on this topic into the overbroad statement that Tonawanda Coke provided no environmental training of any character, "even the most basic environmental training," is unwarranted.

G. Tonawanda Coke's History of Notices of Violation

At page 15 of its sentencing submission, the Government cites to four different Notices of Violation issued to the company between 1998 and 2008. Even though the earliest notice is from 1998, it is understood that, dating back to the 1980s, Tonawanda Coke had not been issued any Notices of Violation. The number of notices issued to the company, particularly given that it operates as a coking facility, is extraordinarily low.

The nature of the violations is also noteworthy. The 1998 violation concerned the opacity of coke pushing. The 2006 violation pertained to opacity observed by emissions of the waste heat stack. The 2008 violation had to do with the inoperable pilot light on the Battery flare stack. The 2009 violation concerned the absence of baffles in the eastern quench tower, a subject of Counts 6-10 of the Indictment.

Any violation notice is understood to be a serious matter; however, the limited number and character of these notices, considered in the context of the company's operation as a coking facility, is remarkable.

H. Acceptance of Responsibility

The Government contends that, as to both defendants, there has been a "complete lack of acceptance of responsibility[.]" Government's Sentencing Memorandum at 7. The Government contends that Mr. Kamholz's refusal to acknowledge that either the valve atop the light oil scrubber column or the water seal bleeder located beyond the Boilerhouse (an argument raised for the first time in the Government's sentencing submission) was the pressure relief valve referenced on page 4-2 of the July 2003 emissions study constitutes a lack of acceptance. Government's Sentencing

Memorandum at 11. The only later point in the Government's submission when this subject is discussed appears at page 33, where it is indicated that "Defendant Kamholz seeks to explain the offenses of conviction as largely resulting from poor communication with NYS-DEC."

As demonstrated above, the defense position on the meaning of the pressure relief valve reference in the emission study is well-founded. In his sentencing memorandum, and in his Objections to the PSR, Mr. Kamholz fully addresses his acceptance of responsibility. His acknowledgment that he could have done better communicating with state and federal regulators is but one part of his acknowledgment that he accepts full responsibility for the offenses of conviction. The Government has cited no other evidence supporting its blanket assertion that there has been an utter lack of acceptance of responsibility on the part of Mr. Kamholz. This is simply not true.

CONCLUSION

As can be seen, the vast majority of the sentencing factors cited by the Government are unreliable, either because the facts have been exaggerated or overstated, the claims by the Government are not supportable, the cited allegations are simply untrue, or the contentions are not based on a trustworthy source. All of these cited factors should not be considered by the Court in making a sentencing determination as to Mr. Kamholz.

The remainder of the factors relied upon the Government need to be considered in context. Substantial mitigating factors emerge, which serve to place the criticized conduct of the defendant in a more favorable light.

Mark Kamholz reiterates his request that the Court impose a non-*Guidelines* sentence which spares him from any period of incarceration. The factors relied upon by the Government in its

sentencing submission, whether considered individually or collectively, do not dictate a contrary result.

Dated: Buffalo, New York
September 30, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 2013, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

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